

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITHERM FOOD SYSTEMS, INC., :

4 Petitioner, :

5 v. : No. 04-597

6 SWIFT-ECKRICH, INC., DBA :

7 CONAGRA REFRIGERATED FOODS. :

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9 Washington, D.C.

10 Wednesday, November 2, 2005

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

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16 the Petitioner.

17 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.;

19 for United States, as amicus curiae, supporting the
20 Petitioner.

21 ROBERT A. SCHROEDER, ESQ., Los Angeles, California; on
22 behalf of the Respondent.

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P R O C E E D I N G S

[10:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument
first today in Unitherm Food Systems versus Swift-Eckrich.
Mr. Bailey.

ORAL ARGUMENT OF BURCK BAILEY
ON BEHALF OF PETITIONER

MR. BAILEY: Mr. Chief Justice, and may it
please the Court:

In 1947, this Court stated, in Cone versus West
Virginia Pulp & Paper Company, 330 U.S. at 216, quote,
"Determination of whether a new trial should be granted,
or a judgment entered under Rule 50(b), calls for the
judgment in the first instance of the judge who saw and
heard the witnesses and has the feel of the case, which no
appellate printed transcript can impart." That language
was repeated verbatim the following year in Globe Liquor
versus San Roman. And, in the year after that, both Cone
and Globe Liquor were cited for the same proposition in
Fountain versus Filson. And, in 1952, in Johnson versus
New York Railway, this Court again reiterated the
requirement -- is the word the Court used -- of submitting
a post-verdict motion, or JNOV, to preserve sufficiency of
the evidence for appellate review.

JUSTICE O'CONNOR: Now, was there a Rule 59

1 motion made here after the verdict?

2 MR. BAILEY: No, Your Honor. There was a motion
3 for a remittitur --

4 JUSTICE O'CONNOR: Right.

5 MR. WOLFMAN: -- of damages.

6 JUSTICE O'CONNOR: Had a Rule 59 motion been
7 made, would it preserve a sufficiency-of-the-evidence
8 argument in connection with the motion for new trial?

9 MR. BAILEY: Not a sufficiency-of-the-evidence
10 argument, Your Honor. And that -- this Court spoke to
11 that in footnote 9 of the Weisgram opinion. But a Rule 59
12 motion contesting the weight of the evidence would have
13 been appropriate. No such motion was filed.

14 Eight of the Circuit Courts of Appeals have held
15 that in the absence of a post-verdict Rule 50(b) motion,
16 the appellate court cannot review for sufficiency of the
17 evidence. And that language is in black letter law in the
18 standard treatises on Federal practice, in Moore's and in
19 Wright & Miller, that it is absolutely required. Here --

20 JUSTICE STEVENS: Do any of those circuits allow
21 an exception for plain error?

22 MR. BAILEY: Several of them do --

23 JUSTICE STEVENS: Yeah.

24 MR. BAILEY: -- Your Honor. Some do not, but
25 most, I think it would be accurate to say, do. And, Your

1 Honor, we feel that those cases are mistakenly decided,
2 because the court's ruling on a 50(a) motion -- that is, a
3 pre-verdict motion -- is always interlocutory. I mean,
4 indeed, the trial court is encouraged to deny that motion,
5 pending the jury verdict, because if the jury comes back,
6 obviously, with a defendant's verdict, that's the end of
7 the case. And if the Court, on the other hand, grants
8 it, and the appellate court concludes that there was a
9 jury question, then it has to go back for a whole new
10 trial. So --

11 JUSTICE KENNEDY: Just while I have you, I'm --
12 just while I have you here -- it's not --

13 MR. BAILEY: Yes.

14 JUSTICE KENNEDY: -- probably, directly relevant
15 to this case. On that one point, when I was in practice,
16 it used to irritate me sometimes that the judge should
17 grant the motion and then he'd just sit on it. But I see
18 the wisdom for the rule now, and the judge reserving it,
19 in the event the jury comes out the right -- the, quote,
20 "right way," anyway. What if there's a very long trial?
21 What if, after the plaintiff rests, there's a good grounds
22 for granting the motion for judgment as a matter of law,
23 the judge doesn't do it, and then there's a 3-month trial?
24 Do the judges ever take that into account?

25 MR. BAILEY: Your --

1 JUSTICE KENNEDY: Three more months for the
2 defense to --

3 MR. BAILEY: Yes. Your Honor, I think my answer
4 to that is, not infrequently holes in the plaintiff's case
5 are filled when the defendant's case is put on. That
6 happens, as I say, rather frequently, through cross-
7 examination and -- and it's just extremely iffy to say
8 that won't occur. And, in any event, Your Honor, it
9 raises the specter of this problem that we've just talked
10 about, that that long trial that you -- that you
11 envisioned in your hypothetical would have to -- if the
12 appellate court finds that there is a jury question there
13 --

14 JUSTICE KENNEDY: Yes.

15 MR. BAILEY: -- has to try it all over again.
16 Not a -- not a very good consequence.

17 JUSTICE GINSBURG: On the issue that's before us
18 now, I can understand why, if the, what we used to call,
19 JNOV is not requested after the jury verdict, the
20 appellate court could not then enter judgment -- direct
21 the entry of judgment as a matter of law. But I don't see
22 why it couldn't say, just as we would be reluctant to
23 affirm a decision when there was no claim for relief, so,
24 if there's insufficient evidence, we can remand for a new
25 trial. But you would say that that is not possible

1 either.

2 MR. BAILEY: I would, Your Honor. That's not
3 authorized. There's no way to ask for a new trial in a
4 50(a) motion. I mean, it doesn't provide for that. The
5 trial is still going on. By definition, you can't seek a
6 new trial until the trial is --

7 JUSTICE GINSBURG: But --

8 MR. BAILEY: -- concluded.

9 JUSTICE GINSBURG: -- you haven't asked for it,
10 but the appellate court said, "We don't want to affirm a
11 judgment when there was insufficient evidence, so we are
12 going to" -- there was -- the judge was tipped off by the
13 -- by the directed-verdict motion, that the -- who turned
14 out to be -- the one who turned out to be the verdict
15 loser thinks the evidence is insufficient. That's enough
16 at least to say that the Court of Appeals could grant a
17 new trial.

18 MR. BAILEY: Your Honor, it's our position that
19 you can never ask for -- move for a new trial for -- on
20 the ground that the evidence is against -- the weight --

21 JUSTICE GINSBURG: No, I'm not --

22 MR. BAILEY: -- of the evidence --

23 JUSTICE GINSBURG: -- talking about "against the
24 weight," because a trial judge would rarely be -- if it --
25 if a trial judge said, "It's against the weight of the

1 evidence," it would go back for a new trial, and you
2 couldn't raise that issue, at least not til you go through
3 the whole second trial. But why isn't it like -- I think
4 there are decisions that said there was a judgment, but
5 the Court of Appeals determines there was never a claim
6 for relief to begin with, even though a motion wasn't made
7 to that effect. The idea of a court affirming a judgment
8 that is without sufficient legal basis is troubling.

9 MR. BAILEY: Well, Your Honor, I -- my response
10 to that is that these matters, pursuant to this Court's
11 jurisprudence in Cone and Johnson and other cases, simply
12 mandates that the trial court be asked to pass in the
13 first instance on this issue of sufficiency of the
14 evidence.

15 JUSTICE GINSBURG: But, it -- but it was asked
16 by the -- by the pre-verdict motion. What -- the only
17 thing that wasn't done is, it -- the request wasn't
18 repeated after the verdict. I can see your point if there
19 had never been a motion for directed verdict at the close
20 of all of the evidence. But there was that. And so, all
21 that we're missing is a repetition of the same words after
22 the jury comes in.

23 MR. BAILEY: Well, Your Honor, the -- if I may,
24 the standard of review is radically different. I mean, if
25 motion for a JNOV is asked for and granted/denied, the

1 review is de novo. The issue about a new trial, under 59,
2 is an abuse of discretion.

3 JUSTICE GINSBURG: Well, that's -- the new trial
4 comes in, by the courts that have said this, only --
5 they'd say, "We would direct the entry of judgment for the
6 verdict loser, but we're powerless to do that." And that
7 is all wrapped up in the Seventh Amendment. So, the next
8 best thing is, we grant a new trial.

9 MR. BAILEY: Well, that's certainly what the
10 Tenth Circuit jurisprudence provides, Your Honor. And the
11 Federal Circuit adopted that.

12 JUSTICE GINSBURG: Yes.

13 MR. BAILEY: And we think that that's totally at
14 odds with this Court's rule in Cone and Johnson, that it
15 is out of step with the law in eight Federal Circuits,
16 that it simply is illogical to say, someone who never
17 asked for a new trial -- Your Honor, if they had -- if
18 ConAgra had sought a new trial on sufficiency of the
19 evidence in Federal Circuit, presumably, the Federal
20 Circuit said, "You didn't ask for that below. It's gone.
21 It's waived. What's your next argument?" By not asking,
22 they say, in effect, "Since you didn't ask for it, that's
23 what we're going to give you." And that simply is, Your
24 Honor --

25 JUSTICE GINSBURG: Well, couldn't one regard a

1 new trial as, sort of, subsumed under the request for
2 judgment as a matter of law? That is, that's the larger
3 thing, but at least a new trial. Don't let -- the
4 judgment as a matter of law says, "Don't let this verdict
5 stand." So, one could say, "We won't give you a judgment,
6 but we will order a new trial."

7 MR. BAILEY: And, Your Honor, I -- my response
8 is simply that those are two very different motions and
9 call for two very different standards of review, and it
10 cannot, I respectfully submit, logically be administered,
11 when there's been no request for a new trial. There's no
12 authority to request a new trial in a 50(a) motion. It
13 leads to the kind of confusion that, I submit --

14 JUSTICE STEVENS: Would you refresh my
15 recollection? In the cases you cited at the outset of
16 your argument, where the judgments were reversed, am I
17 wrong in thinking, in those cases, there was, in fact, a
18 new trail afterwards?

19 MR. BAILEY: There -- Your Honor, they had moved
20 for a new trial in those cases. That is, the defendant
21 moved for a new trial. And that -- and this Court --

22 JUSTICE STEVENS: But the judgment of this Court
23 was simply reverse, wasn't it?

24 MR. BAILEY: It was reverse.

25 JUSTICE STEVENS: There were --

1 MR. BAILEY: Of the appellate court --

2 JUSTICE STEVENS: Yes.

3 MR. WOLFMAN: -- of the Eighth Circuit. Yes,
4 Your Honor, that's right. It was -- this Court simply
5 reversed, in Cone and Johnson. Those cases went back for
6 retrial. Yes.

7 JUSTICE GINSBURG: I don't understand your
8 response to me about vastly different standards of review.

9 I would think it would be harder for a verdict loser to
10 get judgment as a matter of law than to get a new trial.

11 MR. BAILEY: At the trial or the appellate
12 level, either one --

13 JUSTICE GINSBURG: Yes.

14 MR. BAILEY: -- Your Honor? Yes. Well, one
15 would -- I quite agree.

16 JUSTICE GINSBURG: That's why --

17 MR. BAILEY: But --

18 JUSTICE GINSBURG: -- I'm suggesting --

19 MR. BAILEY: -- but the --

20 JUSTICE GINSBURG: -- that one is kind of a
21 lesser included.

22 MR. BAILEY: Yes, Your Honor. And the response
23 I have to make is that the reviewing court would determine
24 the issue of new trial on an abuse-of-discretion standard,
25 not on a de novo review of sufficiency of the evidence.

1 CHIEF JUSTICE ROBERTS: They go to different
2 things, don't they? I mean, if you -- you get a new trial
3 when there are -- you know, evidence is admitted that
4 shouldn't have been admitted, or something like that. I
5 mean, they're -- they're, sort of, different grounds.
6 They're not overlapping, are they?

7 MR. BAILEY: They -- very different grounds most
8 -- most commonly, Your Honor. That is, you can -- there
9 can be completely sufficient evidence to support the jury
10 winner's verdict --

11 CHIEF JUSTICE ROBERTS: Well --

12 MR. BAILEY: -- but the Court can still --

13 CHIEF JUSTICE ROBERTS: -- this is a --

14 MR. BAILEY: -- grant a new trial.

15 CHIEF JUSTICE ROBERTS: Right. I mean -- I'm
16 not sure. I mean, is it a -- is insufficient evidence a
17 typical ground for asking for a new trial?

18 MR. BAILEY: Well, not insufficient evidence,
19 but the --

20 CHIEF JUSTICE ROBERTS: No.

21 MR. BAILEY: -- the verdict is against the
22 weight of the evidence. That is the distinction that this
23 Court pointed out in footnote 9 of Weisgram, that if
24 you're talking about the weight of the evidence -- the
25 verdict is against the weight of the evidence; very

1 subjective proposition, but that it is -- then you proceed
2 under Rule 59.

3 JUSTICE SCALIA: And that determination of what
4 was the weight of the evidence is typically left to the
5 trial judge, rather than to the Court of Appeals. It
6 would be --

7 MR. BAILEY: Well, you can --

8 JUSTICE SCALIA: -- somewhat novel for the Court
9 of Appeals to be reviewing a trial judge on the basis of
10 what it thought the weight of the evidence was. It's one
11 thing to say, "If he's denied or granted a motion for a
12 new trial on that basis, we'll look for abuse of
13 discretion," but for the appellate court to do that de
14 novo and assess the weight of the evidence, it seems, to
15 me, quite unusual.

16 JUSTICE GINSBURG: That's --

17 MR. BAILEY: I --

18 JUSTICE GINSBURG: I don't think any appellate
19 court has claimed that authority. We're talking about a
20 new trial in lieu of J- -- a judgment as a matter of law.
21 And the -- one of the whole rationales in Cone and Globe
22 and all of the others was -- saying you should make the
23 post-verdict motion -- is that then the trial judge would
24 have the option. The trial judge might think, "Well,
25 technically, you deserve JMOL, but maybe there was a

1 witness who was out to sea, so I want to exercise my
2 discretion to grant a new trial." Those two are closely
3 linked. I mean, lawyers usually, as a -- just a matter of
4 -- just automatically ask for JNOV or, in the alternative,
5 a new trial.

6 MR. BAILEY: Your Honor, I think it shows
7 respect to the trial judge to require that the trial judge
8 be required, in the first instance, to review this
9 evidence that the trial judge saw, heard, and has the same
10 opportunity, as this Court has observed in cases going
11 back over a century, to see, just like the jurors saw, and
12 provides a perspective on it that is available to the
13 trial judge, alone.

14 JUSTICE SCALIA: Well --

15 MR. BAILEY: Your Honors, if --

16 JUSTICE SCALIA: -- it seems --

17 MR. BAILEY: -- I may, I'd --

18 JUSTICE SCALIA: -- it seems to me that if the
19 Court of Appeals is going to grant a new trial, it must
20 say one of two things. It must say either, number one,
21 "There was not sufficient evidence to go to the jury, but
22 the conclusion of that determination ought to be -- and,
23 therefore, you know, the case is over"; but to say that
24 and then say, "And, therefore, we give a new trial," it
25 seems very strange. Or else, the Court of Appeals has to

1 say, you know, "The weight of the evidence was not in the
2 plaintiff's favor." And if it says that, it's making the
3 kind of a determination that I find unusual for a Court of
4 Appeals.

5 MR. BAILEY: Yes, Your Honor. But circumventing
6 the application to the trial judge --

7 JUSTICE GINSBURG: But --

8 MR. BAILEY: -- in the first instance --

9 JUSTICE GINSBURG: -- in fact, that's not what
10 the Courts of Appeals have said. They have all said, "We
11 would grant judgment as a matter of law, but we're
12 powerless to do that under this case -- Court's case law.

13 We think the evidence is insufficient, not that it's
14 against the weight of the evidence. We think it's
15 insufficient. If we had the power to do it, we would
16 direct the entry of judgment. We can't do that, so we do
17 the next best thing."

18 But in all of the -- including the Tenth
19 Circuit, whose law is relevant here -- the Court of
20 Appeals is saying, "We think the judgment -- there was
21 insufficient evidence to support that judgment. And if we
22 had the power, we would instruct the entry of judgment.
23 We don't have that power."

24 MR. BAILEY: That's exactly what they said, Your
25 Honor. And we say they had no authority to do that. In

1 the absence of taking it in the first instance before the
2 trial court --

3 JUSTICE SCALIA: I suppose they could make the
4 same -- if -- I mean, if that follows, they should be able
5 to do the same thing when there has been no motion made,
6 neither before nor after, right? They could say, "Well,
7 there's no motion made. We really have no authority to
8 reverse this judgment."

9 MR. BAILEY: That's --

10 JUSTICE SCALIA: "But" --

11 MR. BAILEY: -- that's certainly --

12 JUSTICE SCALIA: -- you know, "we certainly
13 think there was not enough evidence, and, therefore, we
14 grant a new trial." Does any court do that?

15 MR. BAILEY: I may have missed, Your Honor --

16 JUSTICE SCALIA: Where no motion has been made
17 --

18 MR. BAILEY: Yes.

19 JUSTICE SCALIA: -- neither before the verdict
20 nor after the verdict, does any appellate court say,
21 "Since no motion was made, we have -- we have no power to
22 reverse the judgment here, but our examination of the case
23 indicates that there was really not sufficient evidence to
24 go to the jury. And, therefore, we will do the lesser
25 thing and grant a new trial"? Does any court of --

1 appellate court do that?

2 MR. BAILEY: Your Honor, I know of no case where
3 an appellate court would do such a thing when there's no
4 motion of any kind that's ever been made contesting the --

5 JUSTICE STEVENS: No, but the trial court could
6 do that, pursuant to Rule 59(d), couldn't it?

7 MR. BAILEY: I'm sorry.

8 JUSTICE STEVENS: I say, the trial court could
9 have done that pursuant to Rule 59(d) without a motion
10 being filed.

11 MR. BAILEY: I quite agree, Your Honor. Yes.

12 CHIEF JUSTICE ROBERTS: Thank you --

13 MR. BAILEY: May I reserve the rest of my time?

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bailey.

15 Mr. Stewart.

16 ORAL ARGUMENT OF MALCOLM L. STEWART

17 FOR THE UNITED STATES, AS AMICUS CURIAE,

18 IN SUPPORT OF PETITIONER

19 MR. STEWART: Thank you, Mr. Chief Justice, and
20 may it please the Court:

21 It's a well established principle of Federal
22 appellate practice that the litigant must adequately
23 preserve a claim in the trial court in order to raise it
24 on appeal. The disputed issue in this case is whether a
25 claim of insufficient evidence is adequately preserved for

1 appeal through the filing of a pre-verdict Rule 50(a)
2 motion or whether a renewed post-verdict motion under Rule
3 50(b) must be filed, as well. The text of Rule 50, the
4 practical considerations that underlie contemporaneous
5 objection rules, and this Court's decisions construing
6 Rule 50 all indicate that a post-verdict motion is
7 necessary for adequate preservation of the claim.

8 I think it may be --

9 JUSTICE SCALIA: What is the usual practice with
10 regard to the pre-verdict motions? Are -- is the initial
11 one made at the close of the plaintiff's case --

12 MR. STEWART: It often is. It can be made --

13 JUSTICE SCALIA: -- and then renewed at the --
14 at the end of all of the evidence?

15 MR. STEWART: I think that's a very typical
16 practice.

17 JUSTICE SCALIA: Yes.

18 MR. STEWART: It doesn't -- it doesn't have to
19 be made at the close of the plaintiff case, but it can be
20 made at any time after the opposing party has had an
21 adequate opportunity to be heard. And so --

22 JUSTICE SCALIA: But they're really different
23 things to be reviewed at those two times. I mean, at the
24 end of all the evidence, there may be some matter that the
25 defendant inadvertently puts in that makes up the

1 deficiency in the plaintiff's case. So, it's really a
2 different motion, isn't it?

3 MR. STEWART: It is requesting the same sort of
4 --

5 JUSTICE SCALIA: Of relief.

6 MR. STEWART: -- relief, but it -- different
7 considerations would affect the trial judge's decision
8 whether to grant the motion. And I think -- in a sense,
9 this goes to Justice Kennedy's question -- that is, one of
10 the reasons that, at least with respect to the motion
11 that's filed at the conclusion of all the evidence, that
12 these motions are almost uniformly not granted, the case
13 is almost always submitted to the jury, because the
14 thought is, very little is lost by submitting the case to
15 the jury, because the suit has been tried already, and
16 there may be substantial gains in efficiency from pursuing
17 that course. I think if a motion was made at the
18 conclusion of the plaintiff's case, and the judge thought
19 it clearly had merit and thought that a substantial
20 savings in cost and time would ensue from granting the
21 motion, the trial judge could take that into account in
22 deciding whether the motion should be granted or not. But
23 I think -- I think it's important to look at the text of
24 Rule 50. And it's reprinted, among other places, at page
25 57(a) of the appendix to the certiorari petition. And in

1 -- at the beginning of Rule 50(a)(1), it says, "If, during
2 a trial by jury, a party has been fully heard on an issue
3 and there is no legally sufficient evidentiary basis for a
4 reasonable jury to find for that party on that issue, the
5 Court may determine the issue against that party." Again,
6 the word "may" is permissive.

7 So, while the judge may take into account
8 potential savings in time and expense, the judge is never
9 required to grant a Rule 50(a) motion, even if the judge
10 is firmly persuaded that the evidence on the other side is
11 insufficient.

12 And then, at the very bottom of the page, the
13 first sentence of Rule 50(b) says, "If, for any reason,
14 the Court does not grant a motion for judgment as a matter
15 of law made at the close of all the evidence, the Court is
16 considered to have submitted the action to the jury,
17 subject to the Court's later deciding the legal questions
18 raised by the motion."

19 And the significance of that sentence is that it
20 says, "No matter what stated rationale the District Court
21 gives" -- whether the District Court simply says, "I'm
22 reserving the motion," or says, "I'm denying it, because
23 the evidence is, in my view, clearly sufficient" --
24 "whatever stated rationale the Court gives, the action
25 will be treated as a reservation of the legal questions."

1 in the favor of the verdict loser. And I think that the
2 text of Rule 50(b) bears that out. If you look farther
3 down that paragraph, on page 58(a), the rule says,
4 "Submission of the case to the jury is to be treated -- or
5 considered to be a reservation of the legal question."
6 And then it said, "The movant may renew the request." And
7 then that sentence says, "In ruling on a renewed motion,
8 the Court may, if a verdict was returned, allow the
9 judgment to stand or grant a new trial or order entry of
10 judgment." And I think that phrase, "in ruling on a new
11 -- renewed motion," is significant, because the only
12 express authority that the District Court has, post-
13 verdict, to grant judgment as a matter of law is that the
14 court may do so in ruling on a renewed motion. The rule
15 doesn't contemplate a situation --

16 JUSTICE STEVENS: So, you're saying that if the
17 judge wants to do what I -- what I hypothesized, the judge
18 should say to the losing party, "Renew your motion, and
19 I'll grant it."

20 MR. STEWART: That's correct. And the judge
21 could do that, either pre- or post-verdict. That is, pre-
22 verdict, the judge could say, "I think your motion may
23 very well have merit, but, in the interest of overall
24 efficiency, I'm going to submit the case to the jury.
25 But, in the event that the jury comes back against you, I

1 would encourage you to renew that motion." There's
2 nothing wrong with the judge encouraging the litigant to
3 file something like that, or signaling that the judge has
4 doubts about the sufficiency of the evidence. But the
5 rule makes the renewed post-verdict motion a prerequisite
6 to entry of judgment as a matter of law, post-verdict.
7 And it --

8 JUSTICE KENNEDY: Can you tell me, if we adopt
9 your position, what should a trial court do if he,
10 alternatively, would grant a new trial? Should he go
11 ahead and make that determination? He grants judgment
12 NOV. And then he really is thinking, "Well, I would have
13 granted a new trial." Should he go ahead and cover
14 himself against reversal by granting the new trial in the
15 alternative, or --

16 MR. STEWART: He should. And, indeed, this
17 Court, in -- as early as *Montgomery Ward*, have said that
18 was the better practice, and that requirement has since
19 been codified in what is now Rule 50(c), which says that
20 if the Court grants the motion for judgment as -- the
21 renewed motion for judgment as a matter of law, and there
22 is also an alternative motion for a new trial, the judge
23 should rule on that, as well, and should basically say,
24 "In the event that my ruling on the JNOV -- or the JMOL"
25 --

1 JUSTICE KENNEDY: "Shall." It does say "shall."

2 MR. STEWART: Yeah, "shall."

3 JUSTICE KENNEDY: It says "shall." Thank you.

4 MR. STEWART: So, "In the event that my ruling
5 on the sufficiency question is reversed on appeal, the
6 Court of Appeals will know how I would have ruled on the
7 new-trial motion, and the processing of the case can be
8 expedited."

9 JUSTICE GINSBURG: It's a -- it's a conditional
10 ruling on the new-trial motion.

11 MR. STEWART: That's correct.

12 JUSTICE GINSBURG: Because if it were a ruling
13 on the new-trial motion, you would never get up to the
14 Court of Appeals.

15 MR. STEWART: That's correct. But the Court --
16 this Court, in *Montgomery Ward*, noted that there may be
17 inefficiencies if the District Court rules on the JNOV
18 motion, but doesn't rule on the conditional motion for new
19 trial, because if the JNOV -- if the ruling on the JNOV
20 motion is reversed on appeal, then there's a need for
21 remand for further proceedings, and it's inefficient.

22 But to return to the point about taking an
23 appeal from a Rule 50(a) motion, I think it would put a
24 District Court in an untenable position to say, "You can
25 reserve ruling on the 50(a) motion, even if you think the

1 evidence is insufficient," and, indeed, it's usually the
2 better practice to do so, but, if you do that, and the
3 jury comes back against the movant, the movant can take an
4 immediate appeal, and you can be reversed on the ground
5 that your ruling on the Rule 50(a) motion was erroneous.
6 There's simply no -- by its -- by the terms of the rule
7 itself, the submission of the case to the jury, in the
8 face of a Rule 50(a) motion, is considered to be a
9 reservation of the sufficiency question.

10 JUSTICE SCALIA: Yes, well, I don't know that
11 you have to read it that way. I mean, you can say that
12 the -- when the -- when the rule says that it -- that it
13 is deemed to have been reserved, it also implies that the
14 question that was reserved is implicitly resolved when the
15 court does not -- does, later, not act. It's an implicit
16 denial. Why can't you read the rule that way?

17 MR. STEWART: I mean, conceivably you could have
18 read the rule that way at the time of Johnson, but first
19 we have this Court's decision in Johnson, which says the
20 submission of a post-verdict Rule 50(b) motion is an
21 essential prerequisite even for the District Court to act
22 on the motion. And, therefore, if the motion is not
23 renewed, the District Court is entitled to treat it as
24 abandoned. And, second, the rule, in its current form,
25 limits the authority of the District Court to enter a

1 judgment as a matter of law post-verdict to the situation
2 where the court is ruling on a renewed motion. The rule
3 doesn't contemplate a situation in which the motion is not
4 renewed and yet the District Court purports to rule on the
5 50(a) motion that was left hanging by the submission of
6 the case to the jury.

7 CHIEF JUSTICE ROBERTS: What about the plain-
8 error question?

9 MR. STEWART: I think we would say, for some of
10 the same reasons that Mr. Bailey has identified, that
11 plain-error review would be inappropriate, because in
12 order to have plain error, there has to be error. And if
13 the gravamen of the appeal is that denial of the pre-
14 verdict Rule 50(a) motion was plain error, it can't be
15 right, because the pre-verdict -- the submission of the
16 case to the jury is treated, as a matter of law, as a
17 reservation of the legal questions, and it can't be plain
18 error to reserve those questions for later decisions.

19 JUSTICE SCALIA: I'm not sure --

20 CHIEF JUSTICE ROBERTS: Thank you Mr. Stewart.

21 JUSTICE SCALIA: -- I understood. Sorry. Just
22 -- I'm not sure I understood. Did you say that even when
23 it's reserved, the judge cannot go back to the reserved
24 motion and grant it unless the motion is renewed?

25 MR. STEWART: That's correct. That was -- that

1 was the fact --

2 JUSTICE SCALIA: Okay.

3 MR. STEWART: -- in Johnson, that the District
4 Court expressly reserved its ruling, and the court,
5 nevertheless, held renewal as essential.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr. Stewart.
7 Mr. Schroeder.

8 ORAL ARGUMENT OF ROBERT A. SCHROEDER

9 ON BEHALF OF RESPONDENT

10 MR. SCHROEDER: Mr. Chief Justice, and may it
11 please the Court:

12 Before getting to some of these questions that
13 have been discussed this morning, I think it's helpful to
14 ground ourselves a little bit in the fundamental decision
15 made by the Federal Circuit that is not within this
16 Court's grant of certiorari, and, therefore, is the
17 foundation from which we proceed. And, rather succinctly,
18 the Federal Circuit said, "Unitherm never presented any
19 evidence that could possibly support critical factual
20 elements of its claim. In particular, Unitherm failed to
21 present any facts that could allow a reasonable jury to
22 accept either its proposed market definition or its
23 demonstration of antitrust injury."

24 Building on that foundation, Unitherm wants a
25 judgment entered in its favor for \$19 million for the

1 injury that they have never proven. And, to get there,
2 they have to accomplish each of three things. First --

3 JUSTICE GINSBURG: May I just stop you with that
4 point? Because one of the things that Unitherm said about
5 that argument -- which, as you prefaced, is not before us
6 -- is, the Court of Appeals was looking to a truncated
7 record to see whether there was sufficient evidence that,
8 in fact, the record was much larger than the piece of it
9 that the Federal Circuit examined, so that the Federal
10 Circuit, when it says there was no evidence, was looking
11 to the appendix that was before us, but that was not the
12 whole picture.

13 MR. SCHROEDER: Your Honor, in the Federal
14 Circuit, each party had the -- had the ability to put any
15 part of the record, or the entire record, before the
16 court, and, under the Federal Circuit's own rule, they
17 were also entitled to go back to the District Court
18 record, whether it was in the appendix or not. So, the
19 entire record --

20 CHIEF JUSTICE ROBERTS: Well, but if they had
21 been on --

22 MR. SCHROEDER: -- was --

23 CHIEF JUSTICE ROBERTS: -- if they had been on
24 notice that insufficiency of the evidence was going to be
25 an issue, they might have put more in the record about the

1 sufficiency of the evidence.

2 MR. SCHROEDER: When the case was appealed to
3 the Federal Circuit, Your Honor, insufficiency of the
4 evidence was presented as an issue at that time. And so,
5 that was --

6 JUSTICE GINSBURG: But under this Federal
7 Circuit's own law, it could not be, because there had not
8 been the post-verdict motion.

9 MR. SCHROEDER: Well, that --

10 JUSTICE GINSBURG: The Federal Circuit is
11 borrowing Tenth Circuit's law for this purpose, but the
12 Tenth Circuit's law, as I understand it, has -- is the
13 position that was just presented to us by Mr. Stewart.
14 That is, if you don't make what used to be called the
15 JNOV, even if you made the directed verdict, you can't
16 raise the sufficiency on appeal.

17 MR. SCHROEDER: Well, Your Honor, going to the
18 Federal Circuit, of course, the meaning of Rule 50 was in
19 dispute. And it was certainly, at that point, ConAgra's
20 position that the evidence was sufficient -- was
21 insufficient, and that was the issue before --

22 JUSTICE GINSBURG: Isn't --

23 MR. SCHROEDER: -- the court.

24 JUSTICE GINSBURG: -- that the Federal Circuit's
25 own rule? It -- it was, I thought, pretty clear what it

1 told us in that footnote, that if we were ruling -- making
2 the ruling -- the Federal Circuit law is, if you don't
3 make the 50(b) motion, you cannot get a reversal on appeal
4 for insufficient evidence.

5 MR. SCHROEDER: That is the Federal Circuit rule
6 in patent infringement cases. It was not the rule that
7 the Federal Circuit would apply in this case, because the
8 Federal Circuit would apply --

9 JUSTICE GINSBURG: Borrow --

10 MR. SCHROEDER: -- apply the rule of --

11 JUSTICE GINSBURG: -- the Tenth Circuit rule.

12 MR. SCHROEDER: Yes.

13 JUSTICE GINSBURG: Yes. But that's -- in
14 respect to the Chief Justice's question, the -- Unitherm
15 could have thought, "Well, the Federal Circuit is not
16 going to deal with sufficiency; therefore, I don't have to
17 beef up" --

18 MR. SCHROEDER: Well --

19 JUSTICE GINSBURG: -- "what I put in the
20 appendix."

21 MR. SCHROEDER: -- certainly, they did have to
22 deal with that, Your Honor, because one of the grounds for
23 appeal was that there as no antitrust standing. So, this
24 issue was before the Federal Circuit, no matter how you
25 view the question. But I think in addition to that,

1 certainly everyone knew, when this case went to the
2 Federal Circuit, that it was ConAgra's position that Tenth
3 Circuit law applied, and that the evidence should be
4 reviewed for its sufficiency --

5 JUSTICE STEVENS: Yeah, but the -- the antitrust
6 standing issue is not the same as the relevant market
7 issue that was decided, is it?

8 MR. SCHROEDER: No, it's not, but it certainly
9 is the same with respect to antitrust injury, and the
10 Federal Circuit found there was no evidence of antitrust
11 injury. So, there, the entire record should have been
12 before the Federal Circuit. And, in fact, it was. And
13 so, when they made the determination that there was no
14 evidence of antitrust injury, they did that in the
15 presence of a full record on that issue. There was no way
16 that anyone could have thought that that issue was not
17 before the --

18 JUSTICE SCALIA: Or as much of the record as the
19 other side wanted to produce.

20 MR. SCHROEDER: Well, we have to assume they
21 covered their bases, Your Honor, yes.

22 Now, let me talk a little bit about some of
23 these issues that have come up.

24 First, with respect to the motion for a new
25 trial, there was a motion for a new trial, under Rule 59,

1 filed in this case. The grounds for that motion were not
2 sufficiency of the evidence; but, under Rule 59, when a
3 motion is made for a new trial, on any grounds, it is
4 before the District Court on all grounds.

5 JUSTICE GINSBURG: I'm looking at the motion
6 that you made, which was not in the first instance for a
7 new trial; it was for a remittitur. This is on page 34(a)
8 of the joint appendix. And you made a motion, in the
9 alternative, for a new trial on antitrust damages, not
10 liability. So, I was really struck by the statement in
11 your brief that you had, indeed, made a motion for a new
12 trial. You made it a motion for a remittitur and, in the
13 alternative, a new trial, limited to damages. You said
14 nothing about a new trial on liability.

15 MR. SCHROEDER: That's correct, Your Honor. I'm
16 merely pointing out that, under Rule 59, once a motion for
17 a new trial is made, all issues relating to a new trial
18 are before the court.

19 JUSTICE GINSBURG: A new trial on damages --
20 that's all you asked for -- not a new trial on liability.

21 MR. SCHROEDER: That's correct, Your Honor. But
22 I certainly would refer the Court to the Cone case, which
23 I think is very similar to this case, procedurally. In
24 Cone, there was a Rule 59 motion. There was no Rule 50(b)
25 -- excuse me, a Rule 50(a) motion, no Rule 50(b) motion.

1 There was a motion for a new trial on the grounds of newly
2 discovered evidence. Nevertheless, in the Cone case, the
3 Court remanded the case for further proceedings, and the
4 -- and the court below considered the question. And, in
5 the end -- the published opinions indicate, that case went
6 back to the Fourth Circuit, and --

7 JUSTICE GINSBURG: It --

8 MR. SCHROEDER: -- in the end --

9 JUSTICE GINSBURG: -- it was -- the new trial
10 request had to do with liability --

11 MR. SCHROEDER: Yes.

12 JUSTICE GINSBURG: -- whether it was for newly
13 discovered evidence or something else. But you -- your
14 motion was limited to damages. And I really don't think
15 that you can get where you want to go from a motion that
16 is limited to damages, when you didn't need to. You could
17 have made a motion for a new trial on the whole case.

18 MR. SCHROEDER: Well, of course, Your Honor, if
19 there were no proof of damages, the whole antitrust claim
20 would fail. But I would also say that it seems to me that
21 when a motion is made under Rule 50(a) for judgment as a
22 matter of law, that certainly permits the District Court
23 to grant a new trial, because it's a lesser remedy. And
24 we see situations all the time --

25 CHIEF JUSTICE ROBERTS: Well, why -- it's -- why

1 is that a lesser remedy? It's just different. I mean,
2 remittitur is a lesser remedy, too, but you don't say,
3 "Well, if you've made a motion for a new trial, and then
4 that falls by the wayside, you -- the court can do
5 remittitur." The approach seems to be, "Something's wrong
6 here, and we have to do something, so what is it that we
7 can do?" And you look around, "Well, maybe we can give
8 them a new trial, or maybe we can have a remittitur." But
9 there are different motions for all these different
10 things, and, if they haven't been made, they seem to be
11 off the board.

12 MR. SCHROEDER: Well, certainly, Your Honor --
13 let's take another example. Suppose a litigant asks, as
14 sanctions, that the case be dismissed. Well, the District
15 Court certainly could say, "Well, you have a point,
16 sanctions are in order. But I'm not going to dismiss the
17 case, I'm going to give you something else." There are
18 many situations like that, where a particular remedy --

19 CHIEF JUSTICE ROBERTS: But the problem there is
20 still the same. Whatever it is that gave rise to the
21 motion to dismiss as a sanction -- the misconduct by
22 counsel -- you're still addressing that same problem. But
23 a new trial addresses different issues than a judgment as
24 a matter of law, and remittitur addresses different issues
25 than a new trial.

1 MR. SCHROEDER: Well, it seems to me that it is
2 the principal point of the trilogy that when a motion is
3 made for entry of judgment based on insufficiency of the
4 evidence, that raises the question of whether there ought
5 to be a new trial. That was the principal point discussed
6 in the trilogy, that you really can't have one without the
7 other.

8 JUSTICE GINSBURG: The principal point was that
9 the Court of Appeals could not enter -- direct the entry
10 of judgment as a matter of law if a 50(b) motion had not
11 been made. That's what those three cases --

12 MR. SCHROEDER: That's --

13 JUSTICE GINSBURG: -- invoke.

14 MR. SCHROEDER: -- absolutely correct, Your
15 Honor, the trilogy stands for that proposition. But in
16 all three cases of the trilogy, even though there was no
17 Rule 50(b) motion, those cases were all remanded. In no
18 case was the verdict winner who had insufficient evidence
19 allowed to prevail. They just remanded the cases. So,
20 the Solicitor General relies on stare decisis, but he's
21 asking the Court to do something radically different from
22 what happened in any of those cases of the trilogy.
23 They're asking that judgment be entered for the party that
24 failed to --

25 JUSTICE O'CONNOR: Had Rule 59 motions been made

1 in those cases?

2 MR. SCHROEDER: It's not clear from the record,
3 I don't believe, as to all of the cases, Your Honor, but
4 certainly it is clear in the first case, the Cone case,
5 that there was a motion --

6 JUSTICE O'CONNOR: Right.

7 MR. SCHROEDER: -- for a new trial, but it was
8 based on different grounds. It was based on newly
9 discovered evidence.

10 JUSTICE BREYER: So far, you're halfway into
11 your argument. I thought the basic question here was,
12 first, whether a Court of Appeals, or anybody, can grant a
13 J- -- what used to be called the JNOV without your making
14 its -- whatever it's called now -- and without somebody
15 making a motion. And from your not opposing that, I
16 guess the answer to the question is, of course not. Of
17 course you have to make a motion. You have to make a
18 motion for everything. The judge is not a genius. He
19 can't -- is not a mindreader. And if you don't make a
20 motion, you lose. Okay? Now, is there any argument
21 against that?

22 MR. SCHROEDER: When you say "that," Your Honor,
23 you mean with respect to the -- to the new trial or with
24 respect --

25 JUSTICE BREYER: No, I -- I mean, I thought --

1 there are two parts to this. Question one is, Can you
2 possibly get a judgment -- what used to be called a JNOV
3 or a JMOL or whatever -- from the Court of Appeals, when
4 you didn't make a motion for it, after the jury came in,
5 in the District Court?

6 MR. SCHROEDER: The --

7 JUSTICE BREYER: They say, "Of course you have
8 to make a motion." And, so far, I've heard no response
9 whatsoever to what I'd think is a fairly basic question in
10 this case. And I'm assuming: of course you have to make a
11 motion.

12 MR. SCHROEDER: Yes, Your Honor. I'm glad you
13 raised that point, because it is the fundamental point of
14 the case. Rule 50(a) provides that a motion for judgment
15 as a matter of law can be made, and specifically says that
16 the judge can grant that motion. And then the rule goes
17 on to say that that motion is deemed to continue to be
18 pending. There is nothing in Rule --

19 JUSTICE SOUTER: No, it doesn't say it -- it is
20 deemed to continue to be pending. The issue is deemed to
21 be reserved.

22 MR. SCHROEDER: Yes, Your Honor.

23 JUSTICE SOUTER: Which is a very different
24 issue. In other words, it's not waived and over with at
25 that point, but it says nothing whatsoever, in express

1 terms, about pending motions.

2 MR. SCHROEDER: Oh, I agree, Your Honor. I
3 paraphrased the rule. But the point is that the motion is
4 still pending. In --

5 JUSTICE SOUTER: No, the issue is reserved. The
6 motion has been ruled upon. The judge says, "No, I'm not
7 going to grant this motion before submitting the issue to
8 the jury." That's the end of the motion. The issue isn't
9 over with, because it can be raised again after the
10 verdict. Isn't that what the rule provides?

11 MR. SCHROEDER: That's certainly not the way I
12 would read it, Your Honor, because in this case --

13 JUSTICE GINSBURG: How about a --

14 JUSTICE O'CONNOR: That's the way this Court has
15 read it. That's the problem.

16 MR. SCHROEDER: I don't believe so, Your Honor,
17 because if the Court -- if the rule says that the Rule
18 50(a) motion can be granted; conversely, it can be denied.
19 If it can be granted or denied, those decisions are
20 appealable under section 2106, which is the general
21 provision that orders of the court can be appealed. I do
22 not see anything in Rule 50 that says that denial of the
23 50(a) motion is not appealable. What Rule 50(b) does is
24 --

25 JUSTICE GINSBURG: Well, it can't -- it can't be

1 -- it would be interlocutory at that stage. It couldn't
2 be raised until final judgment is entered.

3 MR. SCHROEDER: Well, Your Honor, I think that
4 would be a most peculiar rule. Entering judgment in a
5 case is one of the most fundamental and important things
6 that a court does.

7 JUSTICE GINSBURG: Yes, but you don't go up on
8 appeal with a final judgment rule, a firm final judgment
9 rule, as there is in the Federal system, from the denial
10 or refusal to act on a 50(a) motion.

11 MR. SCHROEDER: Well --

12 JUSTICE GINSBURG: The trial isn't over. There
13 is no judgment. You can't appeal til you have a final
14 judgment.

15 MR. SCHROEDER: That's certainly correct, Your
16 Honor, there can be no appeal without a final judgment.
17 But what I'm saying is that an interpretation of Rule 50,
18 as a whole, which says to the trial court judge that a
19 judgment should be entered without resolving the question
20 of whether there is sufficient evidence, and then take
21 that up later, under Rule 50(b), isn't a very good way to
22 proceed.

23 JUSTICE GINSBURG: Well, there is, you know -- I
24 mean, this truly is a case where a page of history is
25 worth much more than logic. The reason for that somewhat

1 strange language is, at common law, it was thought, once
2 the jury came in with a verdict, that was it, the judge
3 had no power to overturn it, because of the Seventh
4 Amendment's Reexamination Clause, "no fact tried by a
5 jury, shall be otherwise re-examined in any court of the
6 United States, than according to the rules of common law."

7 And the rule of common law that is embodied in this
8 somewhat strange language in Rule 50 is that there could
9 be a reserved question so that after the jury comes in
10 with the verdict, the judge would be deciding the pre-
11 verdict question by this post-verdict motion. I mean,
12 there's -- none of this is in doubt, where this language
13 in 50 comes from. It comes from a need to adjust to the
14 Reexamination Clause of the Seventh Amendment. Isn't that
15 so?

16 MR. SCHROEDER: Yes, that's all correct, Your
17 Honor. But if there were no provision of the rule that
18 reserved decision under 50(a), I would still say that the
19 denial of the 50(a) motion should be appealable when the
20 judgment is entered, because the -- all of the prior
21 orders of the court merge into that judgment when it's
22 entered.

23 JUSTICE GINSBURG: But you don't get it out of
24 that language, because that language is there for the
25 specific purposes of allowing a judge, after their

1 verdict, to enter judgment NOV.

2 MR. SCHROEDER: Yes, Your Honor. It certainly
3 is there for that purpose. But the rule doesn't mandate
4 that the court -- that the case proceed by that route.
5 What I'm saying is that once the 50(a) motion is made and
6 denied, the stage is set for an appeal pursuant to section
7 2106. The Rule 50(b) route is merely there to allow a
8 litigant, who does not believe that the issue has been
9 fully heard, briefed, considered by the court, to raise
10 the issue again, but not to put us in the position where,
11 in the normal course, the judge follows the usual
12 procedure of submitting the case to the jury, because the
13 jury may resolve the problem by deciding the case in favor
14 of the party that should win on the evidence, but then, at
15 that point, the judge merely has to enter -- has to enter
16 judgment in order to trigger the 50(b) motion. That
17 doesn't seem to be a good way to proceed, and I don't
18 believe that's what's contemplated by the rule. And, in
19 fact, it is a common practice among --

20 JUSTICE GINSBURG: He doesn't enter judgment to
21 trigger the 50(b) motion. The 50(b) motion is made in
22 between the verdict and the entry of judgment.

23 MR. SCHROEDER: Well, Your Honor, the rule says
24 that it can be made up to 10 days --

25 JUSTICE GINSBURG: Right.

1 MR. SCHROEDER: -- after the entry of judgment.

2 So, from the point of view of the District Court, if the
3 court ever wants to get to the end, wants to put a time
4 limit on this, the only way to do it is to enter judgment.

5 That forces the moving party to get a 50(b) motion --

6 JUSTICE GINSBURG: But I don't --

7 MR. SCHROEDER: -- on account of the defendant.

8 JUSTICE GINSBURG: -- I don't follow that,
9 because you -- you know, I'm sure, that it's almost
10 routine that -- yes, you have the 10 days, the extra 10
11 days, under the rules -- but isn't it almost routine, at a
12 trial, that the verdict loser will say, "Judge, please
13 give me JNOV, or, if not, a new trial"? They don't wait
14 til after the judgment is made -- entered. They could.
15 But it's just -- well, in the trials I've seen, it's
16 almost by rote that lawyers who lose, where the jury comes
17 in for the other side, will renew the judgment-as-a-
18 matter-of-law motion and ask, in the alternative, for a
19 new trial. Isn't that the common practice?

20 MR. SCHROEDER: Well, I think it's a common
21 practice in those circuits which have indicated that a
22 50(b) motion is required to preserve all rights to
23 appellate review. Whether or not it is the common
24 practice in other circuits where that is not required, I'm
25 not sure. Certainly --

1 JUSTICE GINSBURG: Well, it's not a question of
2 what is required or what is permissive, but isn't it to
3 the lawyer's advantage, to the client's advantage, to say
4 to the judge, sooner rather than later, "Don't enter
5 judgment. Give me -- give me judgment NOV or at least a
6 new trial"?

7 MR. SCHROEDER: Well, Your Honor, this case may
8 be a little different from some, in that the precise issue
9 that was presented to the Federal Circuit, the failure of
10 proof, was something that was identified very early in the
11 case. And it was presented numerous times to the District
12 Court by a way of a summary judgment motion, by way of the
13 pretrial briefs. And the issue had not changed. And, in
14 fact, when the 50(a) motion was made, at the end of the
15 trial, the Court may have noticed that it was made in a
16 rather peculiar way, an attorney attempting to persuade
17 the court that that motion should be granted wouldn't
18 begin the motion by saying, "For the record." But that's
19 what happened here. It was known, at that point, that the
20 judge had made up her mind as to this issue, and wasn't
21 going to change it, and, in fact, declined, on several
22 occasions, to even listen to argument on the point. So,
23 the filing of a 50(b) motion would seem to be contrary to
24 the generally accepted practice that attorneys are not --

25 JUSTICE O'CONNOR: Well, if -- should we

1 disagree with you, Mr. Schroeder, on that, you seem to
2 fall back, at the end of the day, on a plain-error notion.

3 Is --

4 MR. SCHROEDER: Well --

5 JUSTICE O'CONNOR: -- that right?

6 MR. SCHROEDER: -- there are several things that
7 we would fall back on, Your Honor. When you say "fall
8 back," I assume that that means if the Court were not to
9 follow the precedent of the trilogy --

10 JUSTICE O'CONNOR: If we don't agree with you on
11 the --

12 MR. SCHROEDER: On the meaning of --

13 JUSTICE O'CONNOR: -- need for a --

14 MR. SCHROEDER: -- the trilogy.

15 JUSTICE O'CONNOR: -- 50(b) motion.

16 MR. SCHROEDER: Okay. Under those
17 circumstances, there were two questions. One is, of
18 course, plain error, and the other is retroactivity.

19 JUSTICE O'CONNOR: Have we ever said that plain
20 error would preserve this, in the civil context?

21 MR. SCHROEDER: No, Your Honor. We have found
22 no case, either way --

23 JUSTICE O'CONNOR: No, I --

24 MR. SCHROEDER: -- on that.

25 JUSTICE O'CONNOR: -- haven't either.

1 patent."

2 MR. SCHROEDER: Well, there's not --

3 JUSTICE BREYER: Obviously, there's injury,
4 because a patent allows you to raise the price. End of
5 the matter. Now, that's naive, but somebody who doesn't
6 know antitrust law thoroughly couldn't possibly think that
7 there is plain error here. What's the response to that?

8 MR. SCHROEDER: Well, I think, Your Honor, first
9 of all, in determining plain error, it's necessary to put
10 it in the context of this case, where that very issue had
11 been raised repeatedly and had, in fact, been ruled on by
12 the court in denying the summary judgment motion. So, we
13 weren't dealing with someone who was naive in this
14 respect. We were dealing with someone who had faced this
15 precise issue, and the very closely related issue of
16 antitrust standing, which focuses on antitrust injury.
17 So, we got to this point in the trial. We had a great
18 deal of history --

19 JUSTICE BREYER: What I'm worried about, to put
20 all my cards on the table -- if we were to say there is
21 even a possibility of plain error in this case, the plain-
22 error exception in the rules would become a monster,
23 wherein complex cases, people who hadn't made the proper
24 motions would all be arguing plain error just as if they
25 had.

1 MR. SCHROEDER: Well, certainly the plain-error
2 argument is always, in a sense, available, Your Honor.
3 But I do think this is an extreme case, and I think that's
4 reflected by what the Federal Circuit said, that I read at
5 the beginning of my argument. But that's extremely
6 strong.

7 CHIEF JUSTICE ROBERTS: It's an extreme case,
8 because there's insufficient evidence?

9 MR. SCHROEDER: It's an extreme case for a
10 number of reasons, and that's certainly one of them.
11 There isn't just insufficient --

12 CHIEF JUSTICE ROBERTS: Well, it's --

13 MR. SCHROEDER: -- evidence, but --

14 CHIEF JUSTICE ROBERTS: -- not going to be plain
15 error in every insufficient-evidence case.

16 MR. SCHROEDER: No, but in -- this is a -- an --
17 a case in which the insufficiency of the evidence was
18 extremely apparent. These parties --

19 JUSTICE SOUTER: All right, let's assume it's
20 extremely apparent. Isn't -- and assume, just for the
21 sake of argument, that we have a simple case, not a
22 complex case, so it's easy to see that, in fact, the
23 evidence falls short. It's still the case that this Court
24 has discouraged, or has certainly -- has either
25 discouraged the granting of motions at the close of the

1 plaintiff's case, or at the close of all the evidence --
2 in any event, has put its imprimatur on denying those
3 motions, subject to renewal after verdict. How can we
4 possibly find that there is plain error when a court does
5 exactly what we have encouraged them to do in order not to
6 waste a lot of trial time and jury time? How could we
7 ever find there is plain error, except with respect to the
8 renewed motion after the verdict?

9 MR. SCHROEDER: Well, Your Honor, certainly
10 where the motion has been made and has, in fact, been
11 briefed, and has been considered by the court, and where
12 you have a situation in which --

13 JUSTICE SOUTER: And we have said, "Don't grant
14 it."

15 MR. SCHROEDER: I'm sorry, Your Honor?

16 JUSTICE SOUTER: And we have said, "Don't grant
17 it."

18 MR. SCHROEDER: Well, Your Honor, I guess we'd
19 go back to the proposition that -- I believe that the
20 District Court could grant the 50(a) motion later; it did
21 not have to wait for 50(b) motion. And, in fact, it is a
22 very common practice --

23 JUSTICE SOUTER: It could do that even after it
24 had ruled upon it and had denied it?

25 MR. SCHROEDER: Well, certainly in situations

1 where the Court simply enters judgment and doesn't deny
2 the motion first, that would be true --

3 JUSTICE SOUTER: Well, I --

4 MR. SCHROEDER: -- would be true. But --

5 JUSTICE SOUTER: -- I --

6 MR. SCHROEDER: -- even here --

7 JUSTICE SOUTER: -- I will -- I will grant you
8 that, were it not for our cases, textually, the argument
9 you make is possible. But I don't see how you can make
10 that argument without our overruling a lot of law.

11 MR. SCHROEDER: Well, Your Honor, I -- when it
12 comes to "overruling a lot of law," I think that the
13 fundamental fact here is that, in the trilogy, the case
14 was always sent back for a new trial. Never was judgment
15 entered in favor of the party that had failed to prove its
16 case. So --

17 JUSTICE GINSBURG: Sent back to -- for a new
18 trial because the Court of Appeals ordered a new trial, or
19 sent back to the trial court for that court to decide as a
20 matter of that court's discretion, whether to order --

21 MR. SCHROEDER: That's correct. Sent back --

22 JUSTICE GINSBURG: -- a new trial? The latter.

23 MR. SCHROEDER: -- to the District --

24 JUSTICE GINSBURG: But it --

25 MR. SCHROEDER: -- Court.

1 JUSTICE GINSBURG: -- it was not -- but, here,
2 you're asking us to affirm something that a Court of
3 Appeals did.

4 MR. SCHROEDER: Well, the -- the Court of
5 Appeals ruled that the case should go back to the District
6 Court. We are asking this Court to affirm that and send
7 the case back to the District Court, as a Federal Circuit
8 ruled.

9 JUSTICE SCALIA: I'm not even sure your argument
10 is so strong on the text, frankly. I don't know why 50(b)
11 says -- it sets forth what can be done when the renewed
12 motion is made. You can, if a verdict was returned, allow
13 it to stand, order a new trial, direct entry of judgment.
14 If no verdict was returned, order a new trial, direct --
15 Why does the rule only say, "In ruling on a renewed
16 motion, the Court may"?

17 MR. SCHROEDER: Well, Your Honor.

18 JUSTICE SCALIA: Why wouldn't it say, "In ruling
19 on a renewed motion or in acting upon the motion
20 previously reserved," comma, "the Court may"?

21 MR. SCHROEDER: Well --

22 JUSTICE SCALIA: I mean, where --

23 MR. SCHROEDER: -- I --

24 JUSTICE SCALIA: -- and where does it get the
25 power to do these things, in ruling on a motion previously

1 reserved, if it's not set forth there?

2 MR. SCHROEDER: If you look at 50(a), Your
3 Honor, it specifically says that the 50(a) motion can be
4 granted. Now, that would be inconsistent with a view of
5 the rule that says that the only remedies available are
6 set forth in section (b) and triggered by the renewal of
7 the motion.

8 JUSTICE SCALIA: No, I'm talking about the only
9 remedy available after the motion has been reserved, after
10 --

11 MR. SCHROEDER: Well --

12 JUSTICE SCALIA: -- the court has declined to
13 rule on it once.

14 MR. SCHROEDER: Well, if the motion is reserved,
15 and the court has declined to rule on it, then the -- it
16 would seem to me that it follows that the court can grant
17 that motion.

18 JUSTICE SCALIA: And that's all.

19 MR. SCHROEDER: Well, it can also enter
20 judgment, which constitutes another denial --

21 JUSTICE SCALIA: Can it order a new trial?

22 MR. SCHROEDER: Yes. Most certainly. Because
23 --

24 JUSTICE SCALIA: Where does he get that power,
25 under (a)?

1 MR. SCHROEDER: It is a --

2 JUSTICE SCALIA: Unless --

3 MR. SCHROEDER: It is a lesser remedy --

4 JUSTICE SCALIA: Ah.

5 MR. SCHROEDER: -- than the one requested, that
6 was --

7 JUSTICE SCALIA: Oh, well, then it shouldn't
8 have been set forth in (b). You didn't have to say it.
9 You could have just said, you know, "Allow" --

10 MR. SCHROEDER: Well, Rule 50(a) doesn't
11 literally say that the motion can be denied. It simply
12 says that it can be granted. But I think we have to infer
13 from that, that it can be denied. And I would equally
14 infer that a lesser remedy is possible once the 50(a)
15 motion is made. But I don't think it's possible to read
16 the rule as saying that the only way these remedies are
17 available is through a 50(b) motion, because that's
18 inconsistent with the provision that the motion can be
19 granted under 50(a).

20 The -- it, further, seems to me that if the --
21 if the motion is -- if decision on the motion is deemed to
22 be had -- to have been deferred, then that motion is still
23 before the court, even if the court has denied it. And
24 the court can grant it later on --

25 JUSTICE SOUTER: Yeah, but the --

1 MR. SCHROEDER: -- instead of interjecting --

2 JUSTICE SOUTER: -- rule doesn't deem it to have
3 been deferred. A judge may, in fact, not rule on it,
4 although he does not grant it. But the rule does not say
5 that the motion is deemed to be deferred. The rule talks
6 about the issue being reserved, which is a different
7 thing. And the issue may be reserved whether the judge
8 rules on the motion or simply says, "I will take it under
9 advisement and you can renew it after the verdict if you
10 want to." Isn't that correct?

11 MR. SCHROEDER: Well, I would have stopped
12 sooner, Your Honor. I would have said, "I will take it
13 under advisement." That is really the essence of the
14 rule, that the Court has this under advisement. And it is
15 a very common --

16 JUSTICE SOUTER: Well, that may be, but it's
17 still the case that the rule does not deem the -- this
18 rule does not deem, in -- terms, the ruling on the pre-
19 verdict motion to have been deferred.

20 MR. SCHROEDER: Well, Your Honor, it is
21 certainly a common practice that, while the --

22 JUSTICE SOUTER: I'm asking you about what this
23 rule says. Did I just get the rule wrong?

24 MR. SCHROEDER: Well, Your Honor, I think that
25 if ruling on that motion --

1 JUSTICE SOUTER: If you don't --

2 MR. SCHROEDER: -- had been inferred --

3 JUSTICE SOUTER: -- want to answer the question,

4 just say so.

5 MR. SCHROEDER: No, I'm -- I'm very pleased to

6 answer the question, Your Honor. I believe that the rule

7 permits the judge to decide the 50(a) motion at any time

8 prior to entering judgment. And the judge can change his

9 or her mind on that at any time, because the issue is

10 still before the court.

11 JUSTICE SCALIA: Can a judge grant a new trial

12 on a 50(a) motion?

13 MR. SCHROEDER: Yes, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

15 MR. SCHROEDER: Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Mr. Bailey, you have 1

17 minute remaining.

18 REBUTTAL ARGUMENT OF BURCK BAILEY

19 ON BEHALF OF PETITIONER

20 MR. BAILEY: Thank you, Mr. Chief Justice.

21 JUSTICE SCALIA: Do you agree on the answer --

22 with the answer to the last question I asked? Can -- on a

23 50(a) motion, can a judge grant a new trial instead of

24 granting judgment?

25 MR. BAILEY: No, Your Honor.

1 JUSTICE SCALIA: I didn't.

2 MR. BAILEY: The result ConAgra contends for
3 here, may it please the Court, leads to some really bad
4 results. It requires the rejection of longstanding
5 precedent by this Court. It overrules the jurisprudence
6 of eight circuits. It offends the special competency of
7 the trial court. It deprives the appellate court of the
8 trial court's evaluation, an impartial evaluation of the
9 sufficiency of the evidence, so the appellate court is
10 left to sift through the record, an entire record,
11 searching for points that have never been joined below.
12 And it creates confusion, subjectivity, and differing
13 legal standards nationwide.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bailey.

16 The case is submitted.

17 [Whereupon, at 11:03 a.m., the case in the
18 above-entitled matter was submitted.]

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